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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections
State of Florida

Petitioner,

vs.

DENNIS WAYNE SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER ON JURISDICTION

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1. Whether counsel's representation fell below the performance standard required by this Court in Strickland v. Wainwright, __ U.S. __, 80 L.Ed.2d 674 (1984), where counsel's cross-examination, although adequate, did not include all sources of impeachment evidence.

2. Assuming counsel's performance was deficient, does prejudice result from the faiure to use a pretrial statement for purposes of impeachment where the record as a whole demonstrates that counsel effectively attacked the witnesses' credibility using other sources of impeachment evidence.

3. Whether the Court of Appeals failed to properly apply, pursuant to 28 U.S.C. §2254(d), the factual findings made by the state trial court after a full and fair hearing regarding an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears in the appendix hereto as "A 1 - 74." The published opinion is reported as Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984). The order of the District Court, Middle District of Florida, Tampa, Division, appears in the appendix as "A 75 - 178."

JURISDICTION

On November 18, 1983, the federal District Court denied Smith's application for a writ of habeas corpus filed pursuant to Title 28 U.S.C. §2254. On August 24, 1984, the Court of Appeals reversed the lower court's order and on September 10, 1984, the State filed a Suggestion for Rehearing En Banc. The State's application for Rehearing En Banc was denied on

October 31, 1984 and this Petition for Certiorari was filed within sixty (60) days of this date. The jurisdiction of this Court is invoked pursuant to the specific provisions of Rule 17 of the Rules of the Supreme Court, Title 28 U.S.C. 1254(1),

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 28 U.S.C. §2254(a) provides that:

> "The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. §2254(d) provides in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the

factual dispute were not resolved in the state court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdictiin of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue

> was made, pertinent to a determination of the sufficientcy of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

STATEMENT OF THE CASE

The factual background of this case, as is relevant to this proceeding, was summarized by the Florida Supreme Court as follows:

> After taking part in the murder of John Mitchell Arnsdorff, Wesley Johnson turned himself into police. Eventually he was charged with two other murders, as well. In the meantime he implicated Smith in the Arnsdorff murder and, accordingly, Smith was indicted for first degree murder. Smith pleaded not guilty and the cause was set for trial. Before its start, Johnson pleaded nolo contendere to the three murders and was to be given concurrent life sentences in return for testimony against Smith, the sentences to be imposed after the testimony.

Johnson testified to the following: He, Smith and a man named Wagner met at a bar and decided to rob a homosexual in order to obtain money for beer. The three men went to another bar where they met Arnsdorff. On the pretext of giving a party, they invited him to a shack Johnson was staying in. Arnsdorff and Johnson drove in Arnsdorff's car, Smith and Wagner in Smith's car. Johnson and Arnsdorff reached the shack first. Smith and Wagner had taken a wrong turn and were late, but Johnson kept Arnsdorff from leaving by showing him some silver casting equipment. When the former two arrived the men drank beer for a short while and then Johnson grabbed Arnsdorff while Wagner threatened him with an ice pick. While Arnsdorff was restrained Smith took Arnsdorff's wallet, in which there was $6.00, from his car and one of the three removed his wrist watch. They then forced Arnsdorff into the trunk of his own car. Their intention was to abandon him in a remote spot. Wagner and Johnson, in Arnsdorff's car, were following Smith in his car when they ran into a bridge abutment, flattening a tire. (Throughout the night the three had been drinking heavily.) After an

unsuccessful attempt to fix it, the two cars proceeded until the wheel with the flat tire came loose. On of the three opened the trunk and Smith hit Arnsdorff with a tire tool. Wagner then began to stab him with the ice pick. Believing Arnsdorff to be dead they shut the trunk with him in it and went to a gas station. Smith told Wagner to get some gas, which he did. They returned to Arnsdorff's car and at Smith's direction, Johnson doused it with gas and set it afire. (Expert opinion that Arnsdorff died from incineration or asphyxiation from smoke caused by the fire had been introduced into evidence earlier.)

At this point in Johnson's narration the court excused the jury to allow the defense to renew a pre-trial motion that testimony by Johnson as to a second murder by him and Smith be suppressed. The court denied the motion, as it had previously done, on the ground that the second murder, though separate from the first, was part, just as Arnsdorff's, of a single transaction, the robbery, an, therefore, relevant to the Arnsdorff murder.

Johnson then testified that after burning the car he, Smith and Wagner immediately went to a

> swimming hole. An argument over division of the $6.00 and watch ensued between Smith and Wagner. Smith yelled to Johnson to grab Wagner, and while Johnson held him Smith stabbed him with the ice pick. At Smith's direction Johnson pulled Wagner into the swimming hole and held him under water to ensure his death. They transported his body elsewhere and buried it.
>
> Smith took the stand in his own defense. He admitted that he was in the company of Wagner and Johnson on the night of the murder, but claimed that the robbery was their idea. Although he accompanied them to the second bar and left it with them and the victim, he testified that they drove him straight from the bar to his apartment, because he was too intoxicated by beer and drugs to do anything but sleep. That was the last, according to Smith, he saw of them that night. No evidence was introduced by the defense to corroborate the alibi.

365 So.2d 705 - 706 (Fla. 1978). Smith was tried and convicted on one count of first degree murder. Following a sentencing hearing, the trial judge accepted the

jury's recommendation and sentenced the defendant to death. Smith appealed to the Florida Surpeme Court, which affirmed his conviction in Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). In 1981, Smith filed in the state trial court a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The court concluded that the majority of Smith's claims were not appropriate in a post-conviction proceeding and denied the motion without an evidentiary hearing. The Florida Supreme Court affirmed the trial court's order in part but remanded for an evidentiary hearing concerning an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963). See Smith v. State, 400 So.2d 956 (Fla. 1981). Following an evidentiary

hearing, the trial court again denied Smith's motion for post-conviction relief, and the Florida Supreme Court affirmed in Smith v. State, 421 So2d 146 (Fla. 1982).

On February 9, 1983, Smith filed in a federal district court a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The district court denied relief in a Memorandum Opinion dated November 18, 1983. On August 23, 1984, the Court of Appeals reversed, holding that Smith was entitled to an evidentiary hearing on his claim that counsel was ineffective because he failed to impeach prosecution witnesses, Wesley and Patricia Johnson, using conflicting pretrial statements made September 6, 1975. The State filed a timely motion for Rehearing En Banc and a Motion for Stay of Mandate. Both motions were denied on October 31, 1984.

The State of Florida files a petition for Writ of Certiorari seeking review of the decision of the Court of Appeals. An application for Stay was denied by Justice Powell on November 9, 1984. See Wainwright v. Smith, Case No. A-361.

REASONS FOR GRANTING THE WRIT

I.

Whether counsel's representation fell below the performance standard required by this Court in Strickland v. Wainwright, __ U.S. __, 80 L.Ed.2d 674 (1984), where counsel's cross-examination, although adequate, did not include all sources of impeachment evidence.

The Court of Appeals remanded to the district court for a hearing on respondent's claim that trial counsel was ineffective because he failed to impeach prosecution witnesses, Wesley and Patricia Johnson, using pretrial statements of September 6, 1975 which contained no reference to Smith. At respondent's trial, defense counsel impeached Wesley Johnson using his plea agreement with the State[1]

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[1] Johnson's plea bargain with the State allowed him to escape the death penalty in exchange for his testimony against Smith, with actual imposition of sentence to be withheld until after he had testified.

and a "jailhouse note" written by Johnson and sent to Smith.[2] During the State's rebuttal case, the prosecutor called Patricia Johnson, Wesley Johnson's wife, who gave testimony concerning prior consistent statements made by Johnson. Defense counsel impeached Patricia Johnson using her criminal record which consisted of a prior conviction for forgery.

The threshold question in any claim alleging ineffective assistance of counsel is whether counsel's errors or omissions deprived the defendant of a fair trial. Strickland v. Washington, __ U.S. __, 80 L.Ed.2d 674 (1984). This concept is

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[2] While in jail awaiting trial, Johnson wrote a note to Smith which states that "I made sure he heard me talking about how I done it by myself . . . " This note indicates that Johnson confessed to another inmate named Parks so that Smith could call Parks at trial to impeach Johnson.

manifest throughout the Strickland opinion. First, the court points out that

> In giving meaning to the requirement [of counsel] we must take its purpose---to ensure a fair trial--as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

80 L.Ed.2d at 692 - 693. Later, in explaining the prejudice requirement the Court at page 696 states:

> The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance.

Thus, the overriding consideration in any claim alleging ineffective assistance of counsel is whether counsel's errors or

omissions deprived the defendant of a fair trial.

In Strickland, this Court outlined the standard for judging claims alleging ineffective assistance of counsel. The court established a two-prong test which examines attorney performance and prejudice to the defense. With regard to counsel's performance the Court said:

> First, the defendant must show that counsel's performance was deficient. That requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.
>
> 80 L.Ed.2d at 693

In defining "the counsel" guaranteed by the Sixth Amendment the Court explained that the Constitution "envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results." Id. at 692. "Counsel

has a duty" says the Court "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 694. Counsel breeches that duty when he acts in a fashion which is less than adequate to ensure a fair trial.

In respondent's case, defense counsel's impeachment of Wesley and Patricia Johnson was adequate to ensure a fair trial. This is not a case where counsel made no effort to challenge the witnesses' credibility through impeachment, rather this is a case where counsel chose to rely upon most but not all impeachment evidence at his disposal. How much or what type of impeachment evidence counsel chooses to rely on is simply a matter of professional judgment. See Michel v. Louisana, 350 U.S. 91, 101 (1955).

This Court in Strickland recognized a "presumption of effectiveness." The court said:

> Because of the difficulities inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra at 101, 100 L.Ed. 83, 76 S.Ct. 158.
>
> 80 L.Ed.2d at 695

It was defense counsel's manifest strategy during trial to attack Johnson's credibility primarily on the basis of his plea agreement with the State under which he escaped the death penalty himself in exchange for his plea and testimony against Smith, with actual imposition of sentence to be withheld until after he had testified. Counsel made that point during

his cross-examination, together with the fact that Johnson had taken sole responsibility for the crime on another occasion. Other lawyers might have proceeded differently; and, because it has since become known the jury elected to credit Johnson's testimony anyway, it is easy to suggest through hindsight that perhaps this additional impeachment evidence might have been persuasive and that counsel should have proceeded differently. That is not enough, however, to warrant a finding of ineffective assistance of counsel. See Strickland v. Washington, supra at 694.

The Court of Appeals incorrectly assumes that counsel, to be effective, must make use of all impeachment evidence at his disposal. This "if you can do, you must do philosophy" is directly contrary to this Court's view in Strickland that

counsel must be afforded wide latitude in making tactical decisions. 80 L.Ed.2d at 694. Moreover, the effect of the assumption, that counsel must make use of all available impeachment evidence, establishes a "checklist" for judicial evaluation of effective cross-examination. In Strickland, this Court warned against creating a "checklist for judicial determination of attorney performance." Id.

Defense counsel's cross-examination, was not so inadequate as to undermine the reliability of the results of the proceedings. Respondent has failed to overcome the "presumption of effectiveness" and is not entitled to an evidentiary hearing on this claim.

II.

Assuming counsel's performance was deficient, does prejudice result from the failure to use pretrial statements for purposes of impeachment where the record as a whole demonstrates that counsel effectively attacked the witnesses' credibility using other sources of impeachment evidence.

Any deficiencies in counsel's performance, even if professionally unreasonable, must be prejudicial to the defense in order to constitute ineffective assistance. Washington v. Strickland, supra at 696. In assessing the degree of prejudice necessary to warrant reversal, this Court distinguished between errors which effect the outcome of the proceeding and errors which undermine the reliability of the result of the proceeding. Rejecting the first standard, the "conceivable benefit

test," as to lenient this Court adopted the reliability standard and fashioned a test which focuses on fundamental fairness. The Court said:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> 80 L.Ed.2d at 698.

"A probability sufficient to undermine confidence in the outcome" is an error or omission by counsel which renders the results of the proceeding unreliable. The dispositive question, as stated by this Court in Strickland, is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 80

L.Ed.2d at 692 - 693.

In respondent's case, the Court of Appeals decided that the omitted impeachment evidence "could well have affected the outcome of the trial", and therefore, "may well have resulted in prejudice under the test in Strickland." Smith v. Wainwright, 741 F.2d 1248, 1254, 1255 (11th Cir. 1984). The court's rationale appears to apply the same kind of "conceivable benefit test" rejected by this Court in Strickland,

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel could meet that test . . . not every error that conceivabley could have influenced the outcome undermines the reliability of the result of the proceeding. (Citation omitted).
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> 80 L.Ed.2d at 697.

Although the use of additional impeachment evidence might have been beneficial to the defense in this case, failure to use the statements did not result in a breakdown of the adversarial process which renders the results of the proceeding unreliable.

In making the determination whether the specified error or omission resulted in the required prejudice, a court "must consider the totality of the evidence before the judge or jury." Strickland v. Washington, supra at 698. In respondent's case, defense counsel cross-examined Wesley Johnson regarding his plea agreement with the State which allowed him to escape the death penalty in exchange for his testimony. Defense counsel also impeached Johnson using a note he (Johnson) wrote to Smith which states that "I made sure he

heard me talking about how I done it by myself . . . " This note indicates that Johnson confessed to another inmate named Parks so that Smith could call Parks at trial to impeach Johnson. Johnson's plea bargain and other motivations for testifying against petitioner were fully explored during his cross-examination and were available for the jury's consideration in assessing his credibility as a witness. (A 180 - 220) As for Patricia Johnson, defense counsel used the witness' criminal record as a basis for impeachment. Considering the "totality of the impeachment evidence" presented to the jury, counsel's failure to use the pretrial statements of September 6th did not render the results of the trial unreliable.

In the circumstances of this case,

where counsel challenged the credibility of Patricia and Wesley Johnson through competent impeachment evidence, failure to use the prior inconsistent statements of September 6th as further impeachment did not render the results of the proceeding unreliable.

III.

Whether the Court of Appeals failed to properly apply, pursuant to 28 U.S.C. §2254(d), the factual findings made by the state trial court after a full and fair hearing regarding an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963).

The Eleventh Circuit Court of Appeals remanded this case to the district court for a hearing on respondent's claim that trial counsel was ineffective because he failed to impeach prosecution witnesses Wesley and Patricia Johnson using their pretrial statements of September 6, 1975. In reviewing this claim the Court of

Appeals decided that the district court would necessarily have to pass on another question--whether these pretrial statements were made available to the defense as required by Brady v. Maryland, 373 U.S. 83 (1963). See, Smith v. Wainwright, 741 F.2d 1248, 1256 (11th Cir. 1984).[3] The identical Brady claim was fully and fairly litigated in the state courts. See, Smith v. State, 400 So.2d 956, 962 - 964 (Fla.

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[3] In its treatment of the Brady claim, the Court of Appeals said:

> If the district court should conclude after an evidentiary hearing that the statements were not available to trial counsel . . . the district court should conclude that under 28 U.S.C. §2254(d)(3), the material facts were not adequately developed at the state court hearing. See Thomas v. Zant, 697 F.2d 977, 980 (11th Cir. 1983), and issue the writ under Brady v. Maryland. (footnote omitted)

Smith v. Wainwright, 741 F.2d at 1256

1981), appeal following remand, 421 So.2d 146 (Fla. 1982). The Court of Appeals failed to accord these findings a presumption of correctness as required by 28 U.S.C. §2254(d) and Sumner v. Mata, 449 US. 539 (1981).

The standard applicable to evidentiary hearings involving "material facts not adequately developed at the state court proceedings" are governed by Townsend v. Sain, 372 U.S. 293, 313 (1963) and section (d)(3) of the federal habeas corpus statute, 28 U.S.C. §2254. To obtain an evidentiary hearing based on such a claim the petitioner must make a showing of two elements. First, the petitioner must show that a fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing and that this fact was crucial to a

fair development of the material facts. Second, petitioner must show that failure to develop the material fact in the state proceeding was not attributable to his own inexcusable neglect or deliberate bypass. Id. at 317. A demonstration of both these elements entitles a petitioner to an evidentairy hearing on the substance of his federal claim.

The record in this case shows that Smith has failed to make a showing on the first part of the Townsend test, a fact pertaining to his constitutional claim was not adequately developed at the state court level. Unlike Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), cited by the Court of Appeals, Smith did not come into federal court with a crucial piece of evidence not presented earlier at any hearing. See also, Young v. Zant, 727 F.2d

1489, 1492 (11th Cir. 1984) (defendant presented no new evidence to federal court which would entitle him to an evidentiary hearing.) The petitioner in Thomas produced an affidavit from his trial attorney which came very close to admitting that the attorney had no strategy at all for the penalty phase of Thomas' capital trial. The court found the affidavit sufficient to meet the first prong of the Townsend test, requiring that the evidence sought to be presented in the federal evidentiary hearing must be material to the disputed issue involved. Thomas v. Zant, supra at 988. Unlike Thomas, the respondent in this case presented no new evidence to the district court which would entitle him to a hearing on the Brady claim.

The record is also clear that failure to develop the material facts was due to petitioner's own inexcusable neglect or deliberate bypass. Townsend v. Sain, supra at 317. Respondent's attorney was not present at the state hearing on the claimed Brady violation, having moved out of the state. But the record of the hearing shows that Smith's new lawyers had previously conferred with trial counsel by telephone. No continuance was sought in order to obtain the trial attorney as a witness, nor does Smith explain why he could not have deposed the attorney, even if he was unable to subpoena him. Cf., Birt v. Montgomery, 725 F.2d 587, 590 n. 5 (11th Cir. 1984) (en banc) (noting possibility that petitioner could depose witness without passing on sufficiency of state hearing). Smith's failure to

develop the material facts in the state proceeding was attributable to his own inexcusable neglect or deliberate by-pass.[4]

Whether the pretrial statements of September 6th were made available to the defense as required by Brady was fully and fairly litigated in the state courts and should be accorded a presumption of correctness pursuant to §2254(d) and Sumner v. Mata, supra. Respondent failed to meet

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[4] In Henry v. Mississippi, 379 U.S. 443, 451 (1965), this Court put to rest the suggestion in Fay v. Noia, 372 U.S. 391 (1963) and Johnson v. Zerbst, 304 U.S. 458 (1938) that only the defendant himself could make an effective waiver of constitutional rights. The Court held that counsel's decisions on trial strategy could amount to a waiver binding on the defendant which would preclude him from a decision on the merits of his federal claim.

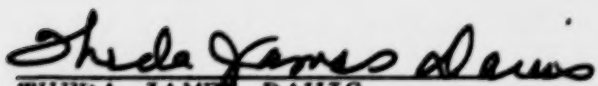
the first prong of the Townsend test which requires a showing that a material fact pertaining to his federal constitutional claim was not adequately developed at the state court proceedings.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant Certiorari and to summarily reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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